In the Supreme Court of the United States.

OCTOBER TERM, 1901.

FRANK R. MOORE, AS UNITED STATES collector of internal revenue, first district, State of New York, plaintiff in error, *v.* MAX RUCKGABER, SR., AS SOLE EXECUTOR OF the last will and testament of Louisa Augusta Ripley-Pinede, deceased.	No. 295.
FERDINAND EIDMAN, UNITED STATES collector of internal revenue for the third district of New York, plaintiff in error, *v.* MIGUEL R. MARTINEZ, AS ANCILLARY ADMINistrator with the will annexed of Salvador Elizalde, deceased.	No. 287.

BRIEF FOR THE UNITED STATES IN REPLY.

I.

The question before the court is one of construction. The language of the act permits of two constructions. The one taxes all personal property (with the exceptions mentioned in the act) within the United States, passing by will or by descent or by gift to take effect after death. The other exempts such property if the decedent had a domicile abroad at the time of his death.

This exemption is claimed upon the ground that in the transmission and taxation of personal property the maxim *mobilia personam sequuntur* ought to and does apply; and in support opposing counsel rely upon the English case of *Thompson* v. *Advocate-General* (12 Clark and Fin., 1), which has been followed in the United States in *United States* v. *Hunnewell* (13 Fed. Rep., 617). The broad assertion is made that "the English courts, prior to the enactment of the act of 1864, had, without exception, construed the English legacy duty act of 1796 so as not to include legacies passing by the wills of nonresidents" (additional brief, p. 17), and that "by an unbroken line of decisions—we say unbroken, as the one or two cases to the contrary are hardly worth consideration—the doctrine of the maxim '*mobilia*,' etc., has been thoroughly established with reference to legacy tax statutes," etc. (additional brief, p. 42).

It is the purpose of this reply brief to lay before the court the authorities which, I submit, show conclusively:

(1) That for nearly fifty years after the passage of the English legacy act of 1796, the English courts never adopted or applied the maxim "*mobilia*," etc., in its construction. When they did finally adopt it, they did so out of considerations of public policy.

(2) That in place of having been thoroughly established with reference to legacy tax statutes in the United States, this maxim of "*mobilia*," etc., has been repudiated and disregarded, and both the legislation

and the decisions of the States have proceeded upon the theory that the situs of the estate and not the domicile of the decedent ought to control in the levying of inheritance taxes.

II.

THE ENGLISH CASE. (**Thompson v. Advocate Gen., 12 Cl. and Fin., 1.**)

So far from it being true that the English courts did without exception construe the English legacy duty act of 1796 so as not to include legacies passing by the wills of nonresidents, the fact is that in *Attorney-General* v. *Cockerell*, 1 Price, 165 (1814), and *Attorney-General* v. *Beatson*, 7 Price, 560 (1815), the English courts held that the doctrine of the domicile of the decedent did not apply and that the situs of the personal property bequeathed was the determining fact. It was not until thirty years after this that the rule of "*mobilia*," etc., was adopted in the case of *Thompson* v. *Advocate-General*.

Lord Campbell, in his opinion in *Thompson* v. *Advocate-General* (12 Clark and Fin., 1), says, page 28:

> The truth is, my lords, that *the doctrine of domicile has sprung up in this country very recently, and that neither the legislature nor the judges, until within a few years, thought much of it;* but it is a very convenient doctrine; it is now well understood, and I think it solves the difficulty with which this case was surrounded. The doctrine of domicile was certainly not at all regarded in the case of *The Attorney-General* v. *Cockerell* (1814), nor in that of *The Attorney-General* v. *Beatson* (1815). If it had been the

> criterion at that time there would have been no difficulty at all in determining this question; but now, my lords, when we do understand this doctrine better than it was understood formerly, I think that it gives a clue which will help us to a right solution of this question.
>
> It is impossible that the words of the statute can be received without any limitation; foreigners must be excluded. Then the question is, What limitation is to be put upon them? And, I think, the just limitation is the property of persons who die domiciled in Great Britain. On such property alone, I think, can it be supposed that the legislature intended to impose this tax.

The statutory ground for the decision is thus given by the Lord Chancellor, page 20:

> In the very first section of the statute the operation of it is limited to Great Britain. It does not extend to Ireland. It does not extend to the colonies. And therefore, notwithstanding the general terms contained in the schedule, those terms must be read in connection with the first section of the act, and it is clear, therefore, that they must receive that limited construction and interpretation which is alone consistent with the first section of the act.

The language referred to by the Lord Chancellor is evidently the following (see act 36, Geo. III, chap. 52, as amended by act 55, Geo. III, chap. 184, July 11, 1815):

> And be it further enacted, That there shall be raifed, levied and paid unto and for the Ufe of

> His Majefty, his Heirs and Succeffors, *in and throughout the Whole of Great Britain*, for and in refpect of the feveral inftruments, Matters and Things, mentioned and deferibed in the Schedule hereunto annexed * * *

The operation of the English legacy tax was limited to Great Britain, and the question for the court to determine was whether the domicile of the decedent or the location of the legacy controlled. By holding that the domicile of the decedent was controlling, the English court brought within the operation of the English law the personal property of all those who were domiciled in Great Britain, wholly irrespective of the location of the property. How such a construction benefited the revenues of England is well described by Judge Pearson, in his opinion in *Alcany* v. *Powell* (2 Jones, Eq., 51, p. 54):

> But in all cases the question is treated as one affecting the public revenue. It is a probable supposition that in England, for every dollar having its situs there but owned by one domiciled abroad, there are one hundred dollars having its situs abroad but owned by one having his domicile there; so, on the score of revenue alone, the consideration for adopting the principle of the *domicile*, rather than that of the *situs* of the property, was one hundred to one.

III.

THE AMERICAN CASES.

In my brief and opening argument I referred to the many decisions of this court holding that the maxim

"*mobilia personam sequuntur*" was never of universal application, and has been obliged to yield to the exigencies of modern life, so as to permit the actual situs of the property to control in matters of taxation when justice so requires. But I have been challenged, both in the oral argument and in the reply brief, to refer to any cases holding that the maxim does not apply in the construction of a legacy act where the language is not explicit and admits of construction. In other words, the contention is that wherever the courts have been free to apply the maxim, they have done so in construing legacy tax laws so as to exempt the personal property of nonresident decedents from legacy taxes. I shall now refer the court to some of the cases in which the courts of this country have explicitly refused to adopt and apply this maxim, although the language of the acts permitted it.

NORTH CAROLINA.

The North Carolina collateral inheritance act provided that:

> A tax of 1 per cent shall be levied and collected upon the value of all personal property or goods bequeathed to strangers or collateral kindred, or which shall be distributed to or among the next of kin, of any intestate when such next of kin are collateral relations of such intestate.

The construction of this language came before the supreme court of North Carolina in the case of *Alvan* v. *Powell* (2 Jones Eq., 51). It is to be observed that the language admits of construction. It is as doubtful

as the language of the English act. It is susceptible of being construed so as to apply either to all personal property situated within North Carolina or to all personal property belonging to decedents domiciled in North Carolina. The case of *Thompson* v. *Advocate-General* was relied on in support of the latter construction. But the court, after criticising, declined to follow this case, and held that the situs of the property and not the domicile of the decedent should control. The opinion by Judge Pearson contains a lucid analysis of the opinions in the English case. The broad consideration favoring the view taken by the court is thus stated (p. 52):

> If the property of one of our citizens, which is situate here, and passes to strangers or his collateral kindred, is subject to a tax because of the protection it receives under our laws, why should not the property of one who has his domicil abroad but whose property is situate here, is protected here, and is administered here, and passes by force of our laws, be subjected to a like tax?

Respecting the claim that personal property descends by the law of the domicile and therefore the transmission of the personal estate of one domiciled abroad ought not to be taxed, Judge Pearson says (p. 58):

> Our courts from comity adopt and act upon the laws of the country of the domicile, *as our law in reference to the particular case*, so as to hold those entitled who would be entitled according to the law of the country of the domicile; but all this is very far from reaching the

proposition that the property is not administered under *the authority of our courts* and by our law. * * *

The idea that our courts administer the laws of another country is a novel one; but the principle that, in particular cases, our court will adopt and act upon, *as our law*, the laws of another country is a familiar one, and is well settled according to the comity of nations in reference to the disposition of the property of deceased persons who have a foreign domicile, upon the ground that if one makes a will which he believes to be valid, because executed according to the laws of his country, it would be hard to disappoint his intentions by refusing to recognize it as valid in the country where his property may happen to be at the time of his death. Or if one dies intestate, under the belief that his property will belong to certain of his kindred, because such is the law of his country, it would be hard to disappoint his expectations by enforcing the general law of the country where the property happens to be, instead of adopting for his special case the law of his country. When the English courts adopted the law merchant, it could not be said they administered the law of the Romans. When we adopted the law of England *we made it our law*; so, when we adopt the law of a foreign country, for special reasons applying to a particular case, *it is our law*.

When a country adopts a foreign law and applies it to persons and property within its own dominion, it does not subject persons and property under its control

to a foreign jurisdiction. It simply enacts by designation, incorporating into the body of its own law the foreign law which it sees fit to adopt. This practice is not unknown to Congress. In legislating for the Territories Congress has seen fit to adopt the law of a particular State and apply it within the Territory, thus enacting by designation or reference. This was done when Congress applied the laws of Oregon to Alaska (23 Stat., 25) and certain statutes of Nebraska to Oklahoma (26 Stat., 87); but the State law thus adopted *became the Federal law*, otherwise it could have had no force within territory subject to the exclusive jurisdiction of Congress.

The opinion in this case is worth reading. It touches upon nearly every point discussed in the case before the court. It is noticeable that the court took the view that the personal property of a nonresident decedent passes in North Carolina *by virtue of the laws of North Carolina, and therefore, in a case of intestacy, by the intestate laws of North Carolina* The court utterly rejects the view that the law of any foreign country can have any force or effect in North Carolina. North Carolina may, out of comity, adopt the law of another country and make that law its own law, but it then becomes its law and not the law of any other country. Obviously, under this construction, the Federal legacy tax would apply to the personal estates of nonresident decedents in North Carolina, for such estates would either pass by will or by the intestate laws of North Carolina. *But if applicable there, ought not the court to adopt a construction*

making the law applicable everywhere? Does not the uniformity enjoined by the Constitution require that the same legacy tax be imposed and collected in every State under the same circumstances?

MARYLAND.

The Maryland collateral inheritance law (Maryland Code, 1888, vol. 2, p. 1242) subjects to the tax—

> All estates, real, personal, and mixed, money, public and private securities for money of every kind, passing from any person who may die seized and possessed thereof, *being in this State*, or any part of such estate or estates, etc., transferred by deed, etc., to take effect after the death of the grantor, etc.

In the case of *State* v. *Dalrymple*, 70 Md., 295 (1889), the question came before the supreme court of Maryland whether the phrase "being in this State" referred to the estate or to the decedent. The words are equivocal. They may be construed either way. If the court cared to follow the maxim "*mobilia, etc.*," the opportunity was open. It was free to adopt the law of the domicil or the law of the situs in construing the act. The court commented, in its opinion, on the English cases, but it declined to follow them, holding that the situs of the property and not the domicil of the decedent must control. Judge McSherry says (p. 301):

> The tax, we have said, is one on the *transmission* of the property "being in the State," and no reason has been assigned or can be suggested why the broad language of the statute and the evident design of the legislature should

be so narrowed and restricted as to exempt from this tax the property of a nonresident actually here, notwithstanding that same property may, for other purposes, be treated as constructively elsewhere. If we adopt the view insisted on by the appellees *it would result in a discrimination in favor of a nonresident and against our own citizens*, a discrimination, too, which the legislature certainly never intended to make, and for which no warrant whatever can be found in the plain letter of the statute.

PENNSYLVANIA.

The collateral inheritance act of 1887 (Laws of 1887, p. 79) subjects to the tax—

> All estates, real, personal, and mixed, of every kind whatsoever, situated within this State, whether the person or persons dying seized thereof be domiciled within or out of this State, and all such estates, situated in another State, Territory, or country, when the person or persons dying seized thereof shall have their domicil within this commonwealth, *passing from any person who may die seized or possessed of such estates, either by will or under the intestate laws of this State*, etc.

It is to be observed that the language "passing from any person who may die seized or possessed of such estates, *either by will or under the intestate laws of this State*," applies to the estates in Pennsylvania of nonresident decedents, as well as to the estates of resident decedents. Both are treated by the act as passing "either by will or under the intestate laws of this State."

In *Small's Estate*, 151 Pa. St., 1 (1892), it was held that the interest of a nonresident decedent in a partnership carried on in Pennsylvania was liable to the tax. Judge Sterrett says, respecting the maxim "*mobilia personam sequuntur*" (p. 14):

> The partnership property was largely made up of lands, merchandise, flour, grain, and other personal property which had a visible and tangible existence and an actual situs in this State. As was said by Comstock, C. J., in *Hoyt* v. *Comrs.* (23 N. Y., 224, 228), "the fiction or maxim, *mobilia personam sequuntur*, is by no means of universal application. Like other fictions, it has its special uses. It may be resorted to when convenience and justice requires. *In other circumstances, the truth and not the fiction affords, as it plainly ought to afford, the rule of action.* * * * *I can think of no more just and appropriate exercise of the sovereignty of a State or nation over property situated within it and protected by its laws than to compel it to contribute toward the maintenance of government and law.*" "A nation within whose territory any personal property is actually situated, has an entire dominion over it while therein, in point of sovereignty and jurisdiction, as it has over immovable property situated there." (Story's Confl. of Laws, 550.)

NEW YORK.

I have already in my brief (p. 15) quoted at length from the decision of the highest court of New York in the *Matter of the Estate of Romaine* (127 N. Y., 80), in

which it is said there can be no more just and appropriate exercise of the sovereignty of a State or nation over property situated within it and protected by its laws than to compel it to contribute toward the maintenance of government and law. "Accordingly," it is said, "there seems to be no place for the fiction of which we are speaking (*mobilia personam sequuntur*) in a well-adjusted system of taxation."

In the *Matter of Whiting*, 150 N. Y., 27 (1896), wherein it was held that the bonds of foreign as well as domestic corporations, and certificates of stock of domestic corporations owned by a nonresident decedent, but deposited by him in a safe-deposit vault in New York, were subject to taxation under the transfer-tax act, Judge Vann says, respecting the maxim (p. 30):

> The legislature intended, as I think, to repeal the maxim "*mobilia personam sequuntur*," so far as it was an obstacle and to leave it untouched so far as it was an aid, to the imposition of a transfer tax upon all property in any respect subject to the laws of this State.

In other words, the policy of New York has been to refuse to permit the maxim "*mobilia*," etc., to be used for the purpose of exempting personal property situated in the State from legacy taxes, and to employ it only for the purpose of bringing personal property located outside the State within the jurisdiction of its legacy tax laws.

The extent to which New York has carried its policy of bringing every possible subject within the operation

of its inheritance-tax laws appears in the following cases:

In the *Matter of Bronson*, 150 N. Y., 1 (1896), while it was held that the bonds of a New York corporation held by a nonresident decedent at his domicil were not subject to the New York transfer tax, they held that certificates of stock in a New York corporation so held were. This was on the ground that while bondholders are creditors, the owners of stock are shareholders, whose property, in contemplation of law, is located where the corporation exists.

In the *Matter of Houdayer* (150 N. Y., 37) it was held that the individual deposits of a nonresident decedent, made by him with a trust company in New York, are subject to taxation under the transfer tax act. Said the court (p. 40):

> The depositary was a resident corporation, and the receiving and retaining of the money were corporate acts in this State. Its repayment would be a corporate act in this State. Every right springing from the deposit was created by the laws of this State. Every act out of which those rights arose was done in this State. In order to enforce those rights, it was necessary for him to come into this State. Conceding that the deposit was a debt, conceding that it was intangible, still it was property in this State for all practical purposes, and in every reasonable sense within the meaning of the transfer tax act.

In the *Matter of Fitch*, 160 N. Y., 87 (1899), the levying of a transfer tax on shares of stock in a New

York corporation (348 shares of Consolidated Gas) was sustained, although these shares, with the consent of the corporation, had been transferred to the legatees by the Connecticut executor, no administration having been taken out in New York.

IOWA.

While the New York policy has been to use the maxim *mobilia*, etc., only for the purpose of extending the operation of its inheritance-tax laws to personal property located outside of New York, Iowa has, it seems to me, repudiated the maxim altogether The collateral inheritance tax of that State is applied to—

> *All property within the jurisdiction of this State*, and any interest therein, whether belonging to the inhabitants of this State or not. (Code of 1897, section 1467.)

And in *Weaver's Estate* v. *State* (81 N. W. Rep., 603) the supreme court of Iowa held that a herd of cattle upon a farm in Missouri, belonging to a resident of Iowa, who died in Iowa, was not subject to the tax imposed, because the act only applied to property "within the jurisdiction of the State," and this property was without the jurisdiction of Iowa and within the jurisdiction of Missouri. Here the situs of the property, and not the domicil of the decedent, was held controlling.

IV.

I have referred to some, but by no means all, the cases repudiating the doctrine of "*mobilia personam sequuntur*" when applied to matters of taxation. I pass

now to a consideration of the question whether the personal property of a nonresident decedent, dying without a will, may properly be said to pass "by the intestate laws of the State" wherein it is situated. I discussed this question *upon principle* in my brief and on the oral argument. It is my purpose now to refer to the inheritance tax laws and decisions of certain States, for the purpose of showing that such personal property is regarded as passing by the intestate laws of the State wherein it is situated for the purpose of levying legacy taxes.

It is true that, owing to the decision in the *Matter of Enston* (118 N. Y., 174) the collateral inheritance tax law of New York was so amended in 1887, and afterwards construed in the *Matter of Romaine* (127 N. Y., 80), as to offer a basis for the argument made by the other side, that in New York the property of a nonresident decedent is not regarded as passing either by will or by the intestate laws of the State, but is taxed only because it is transferred within the State. The wording of the transfer tax law may be used to support this argument. Of course it has never been necessary in New York to consider carefully and determine definitely whether the personal property of a nonresident decedent does pass by the intestate laws of the State, for the reason that there is an explicit provision that if such property is within the State it shall be subject to the tax.

At the same time, to warrant the New York tax, there must be a transfer within New York for the privilege of which the tax is the price paid, and I am at a

loss to understand how there can be a taxable transfer within New York, unless such transfer takes place by virtue of the laws of New York.

If time permitted, I should like to comment on the New York cases, beginning with *Parsons* v. *Lyman* (20 N. Y., 112), and the New York legislation, on the subject of the descent and distribution of the personal estates of nonresident decedents. The cases and the statutes certainly do not support the claim of the other side that right along the maxim "mobilia," etc., has been followed and the law of the domicil of the decedent at the time of his death been recognized and enforced.

In other words, New York has not acted upon the theory that the personal property of the alien decedent situated within New York is to be treated for all legal purposes as located at the domicil of the decedent at the time of his death. It is true that in *Parsons* v. *Lyman* (20 N. Y., 112) and in *Moultrie* v. *Hunt* (23 N. Y., 395), the law of the domicil of the testator at the time of his death was recognized as the proper rule of decision. But that was only a case of lawmaking through comity. The foreign rule adopted became the law of New York. But the rule recognized in *Moultrie* v. *Hunt* has been changed by legislation; that rule was that the law of the decedent's domicil at the time of his death determined the validity of his will, and in 1876 the legislature changed the law by making the domicil of the testator at the time of the making of his will the test (act of April 11, 1876).

In 1880 the act of 1876 was incorporated into the Civil Code, constituting sections 2611, 2612, and 2613. Thus the law remained until 1893, when the substance of these three sections were incorporated in section 2611 of the Code of Civil Procedure. As the New York law now stands the personal property of a nonresident is not supposed to be located at the place of his domicil at death, nor is the validity of his will determined exclusively by the law of such country. The nonresident may now execute a will according to the laws of New York, or in certain cases according to the law of the State or country where the will may be executed. Further provisions upon the subject of wills are contained in section 2694. I merely refer to the statutes. The court may examine them if it sees fit. As the court will perceive before I get through, I plant my case on broader grounds than a mere State rule or enactment. I plant it on grounds applicable, it seems to me, throughout the entire country.

Several States have adopted the phraseology of the New York collateral inheritance tax law, as amended in 1887: California, in its collateral inheritance tax law of March 23, 1893, as amended by the act of March 9, 1897 (Statutes of 1897, p. 77), held to be constitutional in the case of *In re Wilmerding* (117 Cal., 281), and Montana, in its tax law of March 4, 1897 (Laws of 1897, p. 83), held to be constitutional in *Gelsthorpe* v. *Furnell* (20 Mont., 299). The Michigan act, passed in 1899 (Public Acts 1899, p. 285), was evidently based on the transfer tax law of New York and adopts its phraseology.

ILLINOIS.

The Illinois act, passed June 5, 1895 (Hurd's Statutes, 1899, p. 1460), the constitutionality of which was sustained in *Kochensperger* v. *Drake* (167 Ill., 122), and in *Magoon* v. *Illinois Trust and Savings Bank* (170 U. S., 283), follows the phraseology of the New York collateral inheritance law of 1887 in subjecting to the tax—

> All property, real, personal, and mixed, which shall pass by will or by the intestate laws of this State from any person who may die seized or possessed of the same while a resident of this State, or, if decedent was not a resident of this State at the time of his death, which property or any part thereof shall be within this State, etc.:

Singularly enough, in the case of *Billings* v. *The People* (189 Ill., 472, 1901) the opportunity presented itself for a construction of the phrase "the intestate laws of this State." It seems that the widow of a resident testator renounced the provision made for her in the will and took her share under the statutes of the State relating to dower. She then contended that the share she thus received did not pass to her "by the intestate laws of the State." The court held it did, saying (bottom p. 477):

> There are no laws of this State which are specifically designated as "intestate laws," and we are called upon to determine what laws or system of laws were referred to under that appellation by the act in question. The same

> term is employed in similar statutes in other States, *and we have no doubt the laws referred to are those laws of the State which govern the devolution of estates of persons dying intestate and include all applicable rules of the common law in force in this State.* The statutes from which we have above quoted are intestate laws and they govern, regulate, and control the interest which the widow, Augusta S. Billings, took in her husband's property at his death. As a general rule the property of persons dying passes in two ways—that is, by will or by descent in the modes provided by law; and when it does not pass *by will it generally passes by law; that is, by the law governing the disposition of property of persons dying intestate.*

This is precisely our understanding of the meaning of the phrase as used in the Federal law. Congress understood that all property which has not been disposed of by gift to take effect after death, passes either by will or by descent in the modes provided by law. When it does not pass by will it passes by law, and the law by which it passes is the intestate law of the State.

MASSACHUSETTS.

The Massachusetts collateral inheritance law passed in 1891 (Statutes of 1891, chap. 425) subjects to the tax—

> All property within the jurisdiction of the Commonwealth and any interest therein, whether belonging to inhabitants of the Commonwealth or not, and whether tangible or intangible,

which shall pass by will or by the intestate laws of the Commonwealth regulating intestate successions, etc.

It is to be observed that while this law subjects all property within the jurisdiction of the Commonwealth to the tax, it only subjects all property within the jurisdiction of the Commonwealth "which shall pass by will or by the intestate laws of the Commonwealth regulating intestate succession." The question whether the personal property of a nonresident decedent who died without a will passed "by the intestate laws of the Commonwealth regulating intestate succession" came before the supreme court of Massachusetts in *Callahan* v. *Woodbridge* (171 Mass., 595). Judge Knowlton, delivering the opinion, said (p. 597):

> The legal right of the legislature to make such a provision in regard to the property of a nonresident owner rests upon the fact that the property is within the State and subject to its jurisdiction. This power is as large in reference to the property of a nonresident decedent as in reference to that of the inhabitants of the Commonwealth. It covers the property within the jurisdiction. The ground for its exercise is that the property has the protection of our laws, and that our laws are invoked for the administration of it when a change of ownership is to be effected.
>
> In the statute before us the succession to property of nonresidents is expressly taxed as any property belonging to inhabitants of the Commonwealth. The language "which shall

> pass by will or by the laws of the Commonwealth regulating intestate succession," taken in connection with the clauses immediately preceding it, applies to foreign wills, and *to property that passes under the statute of this Commonwealth which regulates the succession to the property of a nonresident owner after his death, and declares that it shall be "disposed of according to the laws of the State or country of which he was an inhabitant.*"

Suppose a case like the Hunnewell case would now arise in Massachusetts. Suppose a person domiciled in France should die intestate, leaving personal property in Massachusetts, and both the State and the Federal tax should be resisted on the ground, in the first instance, that the property did not pass "by the intestate laws of the Commonwealth regulating intestate succession," and in the second instance, on the ground that it did not pass "by the intestate laws of any State." Assuredly the supreme court of Massachusetts, following the case of *Callahan* v. *Woodbridge*, would hold that the property did pass "by the intestate laws of the Commonwealth regulating intestate succession." After such a holding, would this court be free to say that the property did not pass by the intestate laws of any State?

Respecting the contention of the other side, that it is not necessary to appeal to the courts of a State in order to transmit the personal property of a nonresident decedent, but that this may be done by a transfer outside of the court, let me refer to the case of *Greves*

v. *Shaw* (173 Mass., 205), in which it was held that the fact that shares of stock in Massachusetts banking and other corporations owned by a nonresident decedent had been transferred by his foreign executor without taking out ancillary administration in Massachusetts did not avail to avoid the Massachusetts inheritance tax. Judge Knowlton said (p 210):

> Since the enactment of the statute of 1891, chapter 425, persons claiming a succession to property in this Commonwealth under nonresident owners must hold their right subject to the prior right of the Commonwealth to have the property administered here, in order that taxes may be paid upon the succession. The fact that the petitioner was able to obtain a transfer of a large part of the stock before the will was proved in this Commonwealth does not affect his duty under the statute to pay the tax.

MAINE.

The Maine law, passed in 1893 (chapter 146), as amended in 1895 (chapters 96 and 124), follows the phraseology of the Massachusetts law in subjecting to the collateral inheritance tax:

> All property within the jurisdiction of this State, and any interest therein, whether belonging to inhabitants of this State or not, and whether tangible or intangible, *which shall pass by will or by the intestate laws of the State*, etc.

The constitutionality of this law was sustained in an elaborate opinion in *State* v. *Hamlin*, 86 Maine, 495 (1895).

OHIO.

Both the Ohio laws, that passed in 1893 (Laws of 1893, p. 14), which imposes a collateral inheritance tax, and that passed in 1894 (Laws of 1894, p. 166), which imposes a direct inheritance tax, use the exact language of the Maine law, and subject to the tax:

> All property within the jurisdiction of this State, and any interest therein, whether belonging to inhabitants of this State or not, and whether tangible or intangible, *which shall pass by will or by the intestate laws of this State*, etc.

CONNECTICUT.

Precisely similar is the collateral inheritance tax of Connecticut (Laws of 1889, p. 106) which applies to—

> All property within the jurisdiction of this State, and any interest therein, whether belonging to inhabitants of this State or not, and whether tangible or intangible, *which shall pass by will or by the intestate laws of this State*, etc.

As in the case of Massachusetts, so in the case of Maine, Ohio, and Connecticut, it is to be observed that the language used by the lawmakers in levying the inheritance tax assumes and recognizes that personal property within the jurisdiction of the State, although belonging to a person not an inhabitant of the State, passes, in case of death, if not by deed to take effect after death, then either "by will or by the intestate laws of the State." *In each of these States there is the conclusive recognition by legislative enactment of a fact which would subject the estate of a nonresident decedent to the Federal legacy tax.*

TENNESSEE.

The act of April 10, 1893 (Acts of 1893, p. 347), follows the phraseology of the Pennsylvania act in providing for the levying of a collateral inheritance tax on—

> All estates, real, personal, and mixed, of every kind whatsoever, situated within this State, whether the persons dying seized thereof be domiciled within or without this State, *passing* from any person who may die seized or possessed of such estates, *either by will or under the intestate laws of this State*, etc.

The constitutionality of this act was sustained in *State* v. *Alston* (94 Tenn., 674). Obviously the legislature of Tennessee took the view that every estate, of whatever nature, situate within that State, if not disposed of by gift to take effect after death, passed "either by will or under the intestate laws of that State." Clearly, then, the personal estate of a nonresident decedent could not escape the Federal tax in Tennessee on the ground urged in this case.

V.

It is urged that the Federal legacy tax does not apply to the estates of nonresident decedents, because there is no method provided for ascertaining the tax. All these objections to the sufficiency of the machinery of the Federal law may be urged with equal force against the application of the State legacy tax to such estates. Nevertheless, the inheritance tax laws of New York, collateral and direct, which have exemptions

and are graded according to kinship and are computed on the "clear market value" of the property transmitted, have been and are daily applied to every variety of personal estate belonging to nonresident decedents. There is no more difficulty in ascertaining and computing the Federal tax than there is in ascertaining and computing the New York tax. The methods followed in one can be used for the other. The easy manner in which speculative difficulties may be surmounted in the administration of such a law is shown in the *Matter of James*, 144 N. Y., 6 (1894). In that case the authority of an executor in charge of an estate consisting partly of personalty located in England, and partly of personalty located in New York, to pay certain legacies to collaterals out of the English estate and pass the New York estate on to direct heirs, so as to escape the collateral inheritance tax, was sustained. The court pointed out (p. 11) that the fact of such appropriation would, of course, appear upon the account of the executor. If the executor determined to pay the legacies from the English estate, the American estate would be freed from the burden of the special tax. It would be an easy matter for the person in charge of the property within the United States to submit a statement showing that he had or was going to dispose of the property in such a way as to exempt it from the payment of the Federal tax. There was no difficulty in either of the cases at bar in presenting to the proper authorities the real facts affecting the disposition of the American estates of the nonresident decedents.

VI.

If time permitted, I should take pleasure in personally examining the laws of all the States regulating the descent and distribution of the personal estates of nonresident decedents. It is not possible for me to do this. As illustrating the fact that there is a diversity of State laws upon this subject, I print as an appendix extracts from the brief of Mr. George H. Pettit, United States attorney, filed in the circuit court of appeals in the Ruckgaber case. The lesson to be drawn from the variety of provisions is that to make the Federal legacy tax uniform and equal, this court must reject the fiction of the domicile and follow the fact of the situs. In no other way can the law be fairly enforced or the intention of Congress carried into effect. Suppose the court adopts the maxim "*mobilia*," etc., as the rule in interpreting and applying the Federal act. For the purpose of this rule each State is foreign to every other State. If, then, a citizen of Iowa dies in that State leaving personal property in Missouri, which is not within the custody of the Iowa executor or administrator, the Federal officers may be met with this situation when they attempt to collect the tax. The Iowa executor may decline to pay the tax because the Missouri property is not in his custody nor within the jurisdiction of Iowa, the law only applying to personal property which he has in charge. If the Federal officers attempt to collect the tax in Missouri, they may be met with the maxim '*mobilia*," etc., and the assertion that the personal property in Missouri is not

subject to the tax because it follows the domicile of its owner and is deemed to be situated in Iowa. The way out of this difficulty is to tax the transmission of the property where the property actually is when transferred. This the Federal act evidently contemplates, for it makes the person in charge of the personal property liable for the tax and provides that the tax shall be a lien upon the property. The law does not look to the legatee or impose any liability upon him because of the receipt of the property.

In *United States* v. *Allen* (9 Ben., 154; 24 Fed. Cases, 770) it was held that the Federal legacy tax of 1864 imposed a tax *in personam* only on the executor and not on the legatee; that the remedy was either against the executor by a proceeding *in personam* or against the property by a proceeding *in rem*. In this case there was an attempt to sue the legatee personally, which failed. Judge Blatchford, after referring to the provisions of the law, said:

> The executor is made subject to the tax, not the legatee. The executor is to pay the tax, not the legatee. The executor is to make the statement, not the legatee. The executor is to receive the receipt from the collector, not the legatee. If the executor neglects to pay the tax, or to deliver the statement, or violates the requirements of the statute, it is not provided that a suit shall lie against the legatee, in personam, to recover the tax, but that there shall be proceedings to enforce and realize the lien on the property or personal estate of the deceased. Those

proceedings are to be in the nature of proceedings in rem, to subject the property of the deceased in the hands of any person who may have the custody or possession of it, to sale, to pay the tax.

Thus it appears that the essential thing is the presence of the property within the jurisdiction of the United States. The remedy is against the property or the person in custody of it, not against the legatee.

VII.

The Federal tax rests not upon the power to regulate the descent but upon the fact of the transmission of personal property. The fact that the States have the power to regulate the descent and distribution of the personal property of nonresident decedents within their jurisdiction should lead this court, in construing the law before it, *to presume conclusively that the States have done this in every case;* in other words, to presume conclusively that in every case personal property within a State, which has not been disposed of by gift to take effect after death, in passing from the dead to the living, does so either by will or by the intestate laws of the State. If this is not conclusively presumed, then it remains with the State, which has full power to regulate, to say whether such property shall or shall not pass by will or by the intestate laws of the State; that is, by enactment or decision to determine whether the Federal legacy tax shall or shall not be collected on such property within its limits.

Every State has complete dominion over personal

property situated within it, and may regulate its descent or distribution, regardless of where its owner was domiciled when he died. It may enact a body of laws regulating in detail the descent in case of the intestacy of a nonresident, or it may by a general law adopt the laws of the country of the domicile of the intestate for the purpose of determining how his personal property shall pass Will this court say that if a State does the first thing the transmission of the nonresident's property shall be taxed under the Federal law, and if it does the second thing that it shall not be taxed? Will the court permit a fiction to abrogate the uniformity enjoined by the Constitution? The situation here is not akin to that in England when the maxim "*mobilia*," etc., was adopted and applied. Parliament had full power both to regulate and to tax. Congress has no right to regulate; it has only the power to tax. The power to regulate rests with the State. Congress in legislating for the Union assumes this fact. It acts upon the supposition that each State has regulated the descent of personal property within its borders; that the State law controls and not the law of any foreign country. Congress recognizes that all property within the States is subject to the State law and must be passed from the dead to the living by virtue of the State law, that is, either by will or by the law of the State which operates when there is no will. The latter is the intestate law of the State, and it applies as well to nonresidents as to residents. Congress never intended that the States, by any legerdemain,

by any use of fiction instead of fact, should be left free to limit or restrain the Federal Government in the imposition and collection of this duty. Congress did not intend to leave a State free to collect the tax itself because there was a transfer under its laws, within the scope of its jurisdiction, and yet, either by enactment or decision, deprive the Federal Government of the benefit of taxing the same transfer.

JOHN K. RICHARDS,
Solicitor-General.

DECEMBER 17, 1901.

APPENDIX.

SECTIONS 29, 30, AND 31 OF THE ACT OF JUNE 13, 1898 (30 STAT., 464), AS AMENDED MARCH 2, 1901 (31 STAT., 948).

[The amendments are indicated by brackets. The italics indicate provisions to which the attention of the court is directed.]

SEC. 29. That *any person or persons having in charge* or trust, as administrators, executors, or trustees, *any legacies or distributive shares* arising from personal property, where the whole amount of such personal property as aforesaid shall exceed the sum of ten thousand dollars in actual value, *passing*, after the passage of this act, from any person possessed of such property, *either by will or by the intestate laws of any State or Territory*, or any personal property or interest therein, transferred by deed, grant, bargain, sale, or gift, made or intended to take effect in possession or enjoyment after the death of the grantor or bargainer, to any person or persons, or to any body or bodies, politic or corporate, in trust or otherwise, *shall be, and hereby are, made subject to a duty or tax, to be paid to the United States*, as follows—that is to say: Where the whole amount of said personal property shall exceed in value ten thousand and shall not exceed in value the sum of twenty-five thousand dollars the tax shall be:

First. Where the person or persons entitled to any beneficial interest in such property shall be the lineal issue or lineal ancestor, brother, or sister to the person who died possessed of such property, as aforesaid, at the rate of seventy-five cents for each and every hundred dollars of the clear value of such interest in such property.

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Second. Where the person or persons entitled to any beneficial interest in such property shall be the descendant of a brother or sister of the person who died possessed, as aforesaid, at the rate of one dollar and fifty cents for each and every hundred dollars of the clear value of such interest.

Third. Where the person or persons entitled to any beneficial interest in such property shall be the brother or sister of the father or mother, or a descendant of a brother or sister of the father or mother, of the person who died possessed as aforesaid, at the rate of three dollars for each and every hundred dollars of the clear value of such interest.

Fourth. Where the person or persons entitled to any beneficial interest in such property shall be the brother or sister of the grandfather or grandmother, or a descendant of the brother or sister of the grandfather or grandmother, of the person who died possessed as aforesaid, at the rate of four dollars for each and every hundred dollars of the clear value of such interest.

Fifth. Where the person or persons entitled to any beneficial interest in such property shall be in any other degree of collateral consanguinity than is hereinbefore stated, or shall be a stranger in blood to the person who died possessed, as aforesaid, or shall be a body politic or corporate, at the rate of five dollars for each and every hundred dollars of the clear value of such interest: Provided, That all legacies or property *passing by will, or by the laws of any State or Territory,* to husband or wife of the person died possessed, as aforesaid, shall be exempt from tax or duty.

Where the amount or value of said property shall exceed the sum of twenty-five thousand dollars, but shall not exceed the sum or value of one hundred thousand dollars, the rates of duty or tax above set

forth shall be multiplied by one and one-half; and where the amount or value of said property shall exceed the sum of one hundred thousand dollars, but shall not exceed the sum of five hundred thousand dollars, such rates of duty shall be multiplied by two; and where the amount or value of said property shall exceed the sum of five hundred thousand dollars, but shall not exceed the sum of one million dollars, such rates of duty shall be multiplied by two and one-half; and where the amount or value of said property shall exceed the sum of one million dollars, such rates of duty shall be multiplied by three.

SEC. 30 (as amended). That the tax or duty aforesaid [shall be due and payable in one year after the death of the testator and] *shall be a lien and charge upon the property* of every person who may die as aforesaid, for twenty years, or until the same shall, within that period, be fully paid to and discharged by the United States: [and every executor, administrator, or trustee having in charge or trust any legacy or distributive share, as aforesaid, shall give notice thereof, in writing, to the collector or deputy collector of the district where the deceased grantor or bargainer last resided within thirty days after he shall have taken charge of such trust,] and every executor, administrator, or trustee, before payment and distribution to the legatees, or any parties entitled to beneficial interest therein, shall pay to the collector or deputy collector of the district of which the deceased person was a resident [*or in which the property was located in case of nonresidents,*] the amount of the duty or tax assessed upon such legacy or distributive share, and shall also make and render to the said collector or deputy collector a schedule, list, or statement, in duplicate, of

the amount of such legacy or distributive share, together with the amount of duty which has accrued, or shall accrue, thereon, verified by his oath or affirmation, to be administered and certified thereon by some magistrate or officer having lawful power to administer such oaths, in such form and manner as may be prescribed by the Commissioner of Internal Revenue, which schedule, list, or statement shall contain *the names of each and every person entitled to any beneficial interest therein, together with the clear value of such interest*, the duplicate of which schedule, list, or statement shall be by him immediately delivered, and the tax thereon paid to such collector; and upon such payment and delivery of such schedule, list, or statement said collector or deputy collector shall grant to such person paying such duty or tax a receipt or receipts for the same in duplicate, which shall be prepared as hereinafter provided. Such receipt or receipts, duly signed and delivered by such collector or deputy collector, shall be sufficient evidence to entitle such executor, administrator, or trustee to be credited and allowed such payment by every tribunal which, by the laws of any State or Territory, is, or may be, empowered to decide upon and settle the accounts of executors and administrators. And in case such executor, administrator, or trustee shall refuse or neglect to pay the aforesaid duty or tax to the collector or deputy collector, as aforesaid, within the time hereinbefore provided, or shall neglect or refuse to deliver to said collector or deputy collector the duplicate of the schedule list, or statement of such legacies, property, or personal estate, under oath, as aforesaid, or shall neglect or refuse to deliver the schedule, list, or statement of such legacies, property,

or personal estate, under oath, as aforesaid, or shall deliver to said collector or deputy collector a false schedule or statement of such legacies, property, or personal estate, or give the names and relationship of the persons entitled to beneficial interests therein untruly, or shall not truly and correctly set forth and state therein the clear value of such beneficial interest, *or where no administration upon such property or personal estate, shall have been granted or allowed under existing laws, the collector or deputy collector shall make out such lists and valuation as in other cases of neglect or refusal, and shall assess the duty thereon; and the collector shall commence appropriate proceedings before any court of the United States, in the name of the United States, against such person or persons as may have the actual or constructive custody or possession of such property or personal estate, or any part thereof, and shall subject such property or personal estate, or any portion of the same to be sold upon the judgment or decree of such court,* and from the proceeds of such sale the amount of such tax or duty, together with all costs and expenses of every description to be allowed by such court, shall be first paid, and the balance, if any, deposited according to the order of such court, *to be paid under its direction to such person or persons as shall establish title to the same.* The deed or deeds, or any proper conveyance of such property or personal estate, or any portion thereof, so sold under such judgment or decree, executed by the officer lawfully charged with carrying the same into effect, shall vest in the purchaser thereof all the title of the delinquent to the property or personal estate sold under and by virtue of such judgment or decree, and shall release every other portion of such property or personal estate from

the lien or charge thereon created by this act. And every person or persons who shall have in his possession, charge, or custody any record, file, or paper containing, or supposed to contain, any information concerning such property or personal estate, as aforesaid, passing from any person who may die, as aforesaid, shall exhibit the same at the request of the collector or deputy collector of the district, and to any law officer of the United States, in the performance of his duty under this act, his deputy or agent, who may desire to examine the same. And if any such person, having in his possession, charge, or custody any such records, files, or papers, shall refuse or neglect to exhibit the same on request, as aforesaid, he shall forfeit and pay the sum of five hundred dollars: *Provided*, That in all legal controversies where such deed or title shall be the subject of judicial investigation the recital in said deed shall be prima facie evidence of its truth and that the requirements of the law had been complied with by the officers of the Government: [*And, provided further*, That in case of willful neglect, refusal, or false statement by such executor, administrator, or trustee, as aforesaid, he shall be liable to a penalty of not exceeding one thousand dollars, to be recovered with costs of suit. Any tax paid under the provisions of sections twenty-nine and thirty shall be deducted from the particular legacy or distributive share on account of which the same is charged.]

SEC. 31. *That all administrative, special, or stamp provisions of law, including the laws in relation to the assessment of taxes, not heretofore specifically repealed, are hereby made applicable to this act.*

THE DIVERSITY OF STATE LAWS.

[From Mr. Pettit's brief below.]

MAINE.

The laws of Maine provide that—

> When administration is taken in this State on the estate of any person, who, at the time of his death, was not an inhabitant thereof, his estate found here, after payment of his debts, shall be disposed of according to his last will, duly executed *according to the laws of this State*, if he left any; but if not his real estate shall descend according to the laws of this State; and his personal estate shall be distributed according to the laws of the State or country of which he was an inhabitant; and the judge of probate, as he thinks best, may distribute the residue of said personal estate as aforesaid, or transmit it to the foreign executor or administrator, if any, to be distributed according to the law of the place where the deceased had his domicile. (Revised Statutes, chap. 65, sec. 36.)

The State of Maine thus makes a difference between testacy and intestacy that does not support the theory of the Hunnewell case. If the deceased leaves a will it must be according to the law of the State, when his property would certainly pass by the law of that State, and the executor be liable for the tax if the other conditions prevailed, while if the decedent died intestate the law of the domicile would apply, and, if the executor's contention in this case is correct, he would not be liable for the tax.

MISSISSIPPI.

In Mississippi all personal property follows one rule, and it *appears that the law of the domicile is not recognized.* The laws of that State provide:

> SEC. 1542. All personal property situated in this State shall descend and be distributed according to the laws of this State, regulating the descent and distribution of such property, regardless of all marital rights which may have accrued in other States, and notwithstanding the domicile of the deceased may have been in another State, and whether the heirs or persons entitled to distribution be in this State or not; and the widow of such deceased person shall take her share in the personal estate according to the laws of this State. (Annotated Code of Mississippi.)

WASHINGTON.

In the State of Washington there appears to be no distinction drawn between the estates of resident and nonresident intestates in its Statutes of Distribution. Ballinger's Codes and Statutes, vol. 2, sec. 6121, provides that—

> All provisions of law relating to the carrying into effect of domestic wills after probate shall, so far as applicable, apply to foreign wills admitted to probate in this State, as contemplated in the preceding section.

The preceding section provides that foreign wills, executed with certain formalities, be admitted to probate in this State.

WYOMING.

The laws of the State of Wyoming provide that—

> When administration shall be taken in this Territory on the estate of any person who at

> the time of his decease was an inhabitant of any other State or country, his real estate found here, after the payment of his debts, shall be disposed of according to his last will according to the laws of this Territory, and his personal estate according to his last will according to the laws of his domicile; and if there should be no such will his real estate shall descend according to the laws of this Territory, and his personal estate shall be distributed and disposed of according to the laws of the State or country of which he was an inhabitant. (Revised Statutes, sec. 2195.)

This State's law thus provides that the nonresident's will shall be good if executed according to the place of his "domicile," but if he dies intestate then his property passes according to the law of the State or country of which he was an "inhabitant." The words are held in some States to have different meanings. A man may have his domicile in one State, but reside in and be an inhabitant of another State. And the conditions of testacy and intestacy might lead to very different results and situations in Wyoming under the legacy tax law, but in any event the succession must be as directed by the Wyoming law, for this very section is the only authority of the successor to take at all under any rule.

KANSAS.

In the State of Kansas, in case of intestacy, personal property is distributed in the same manner as real estate; and there appears to be no expressed distinction between resident and nonresident intestates, and the provision of law appears to be as follows, in regard to wills:

> If on hearing it shall appear to the court that the instrument (i. e., a foreign will executed,

> proved, and allowed abroad) ought to be allowed in this State, the court shall order the copy to be filed and recorded, and the will and the probate and record thereof shall then have the same force and effect as if the will had been originally proved and allowed in the same court in the usual manner; but nothing herein contained shall be construed to give any operation or effect to the will of an alien different from what it would have had if originally proved and allowed in this State. (General Statutes, vol. 2, p. 566, sec. 57.)

COLORADO.

In the State of Colorado there appears to be no distinction drawn in the Statute of Distributions between resident and nonresident intestates. Statutes, vol. 1, page 421, sec. 99, is as follows:

> The personal estate of an alien, dying intestate, who, at the time of his death, shall reside in this State, shall be distributed in the same manner as the estate of natural born citizens; and all persons shall be entitled to their proper distributive shares of such estate under the laws of this State, whether they are aliens or not.

NEBRASKA.

In the State of Nebraska the law provides as follows:

> When any will shall be allowed as mentioned in the preceding section (i. e., a foreign will allowed in this State), the probate court shall grant letters testamentary or letters of administration with the will annexed, and such letters testamentary or letters of administration shall extend to all the estate of the testator in this State; and such estate, after payment of his just debts and expenses of administration, shall be disposed of according to such will, so far as such will may operate upon it, and the residue

shall be disposed of as is provided by law in cases of estates in this State belonging to persons who are inhabitants of any other Territory, State, or country. (Compiled Statutes, sec. 2661.)

And in section 2691 it further provides:

When any person shall die intestate, being an inhabitant of this State, letters of administration of his estate shall be granted by the probate court of the county of which he was an inhabitant or resident at the time of his death. If such deceased person, at the time of his death, resided in any other Territory, State, or county, leaving estate to be administered in this State, administration thereof shall be granted by the probate court of any county in which there shall be estate to be administered; and the administration first legally granted shall extend to all the estate of the deceased in this State, and shall exclude the jurisdiction of the probate court of every other county.

CALIFORNIA.

The State of California and other States and Territories have sections in their general laws or codes apparently the same, copied either literally or in substance from California; among them are Idaho, Montana, Arizona, and Oklahoma, and the provision is as follows:

Upon application for distribution, after final settlement of the accounts of administration, if the decedent was a nonresident of this State, leaving a will which has been duly proved or allowed in the State of his residence, and an authenticated copy thereof has been admitted to probate in this State, and it is necessary in order that the estate, or any part thereof, may be distributed according to the will that the estate in this State should be delivered to the

> executor or administrator in the State or place of his residence, the court may order such delivery to be made, and, if necessary, order a sale of the real estate and a like delivery of the proceeds. (California Code Civil Procedure, sec. 1667.)

Is not the distribution of the decedent's estate here contemplated according to the law of California or the other State or Territory having the same rule where the property may be situated? If not, why was any law on the subject necessary?

DELAWARE.

The laws of Delaware provide as follows:

> Administration of the goods and chattels, rights and credits of an intestate shall be granted by the register of the county in which he resided at the time of his death; or, if the intestate did not reside in the State, then by the register of any county wherein he has any estate, personal or real; and the administration which shall be first lawfully granted in the last-mentioned case or in the case mentioned in the next paragraph, shall extend to all the estate within the State and shall exclude the jurisdiction of the register in any other county.
>
> If in any case it be expedient that administration be granted upon the estate of a nonresident who left a will proved in another State or country, it may be granted by the register of either county to any suitable person. (Revised Code, 1852, as amended 1893, chap. 89, sec. 8.)

There are many of the States of the Union that do not seem to take any notice of the residence or nonresidence of the decedent, but treat the estates of both alike. And in the American and English Encyclopædia of Law, 2d ed., vol. 13, page 938, it is stated that *only seventeen of the States of the Union apply the*

so-called law of the domicile in dealing with the estates of nonresident decedents. And the footnote to this work specifies the States of the Union in which this law of the domicile applies as Alabama, Arkansas, Connecticut, Georgia, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maryland, Massachusetts, Missouri, New Jersey, New York, Ohio, Pennsylvania, and Vermont.

PENNSYLVANIA.

In the State of Pennsylvania the same doctrine seems to prevail as in the State of New York, relating to the administration of the property therein of deceased nonresidents, except that the legislature of Pennsylvania deemed it necessary to pass a law authorizing aliens to make a will, evidently regarding them as not having such power without it. In Pepper and Lewis' Digest, vol. 1, page 116, they give the law of that State as follows:

> 1. Every person, being a citizen or subject of any foreign State, shall be able and capable in law of acquiring and taking, by devise or descent, lands and other real property in this Commonwealth, and of holding and disposing of the same in as full and ample a manner as the citizens of this State may or can do, and no such lands or estates so held by devise or descent shall escheat or be forfeited to the Commonwealth, for or on account of the alienage of such person claiming the same under any last will, or succeeding thereto, according to the laws of this Commonwealth.
>
> 2. All such persons shall be able and capable in law to dispose of any goods and effects to which they may be entitled within this State, either by testament, donation, or otherwise, and their representatives, in whatever place they may reside, shall receive the succession, according to the laws of this Commonwealth, either

> in person or by attorney, in the same manner as if they were citizens of this Commonwealth. (Laws of 1871.)

The State thus determines at the outset whether or not there shall be any succession at all by will. But the courts of the State will not themselves administer the estates of nonresident decedents, unless there is no one in the State who is entitled to receive the property or any portion of it: when they will direct the transmission of the property remaining after the payment of the debts to the place of residence of the deceased to be distributed to the persons there entitled to it. However, the courts regard themselves as acting under their own law, and not under the law of some other State or country. And this is one of the States where it is supposed the law of the domicile of a nonresident is applied in disposing of such estates.

In the *Matter of Deal's Appeal* (10 Harris, 22 Penn., p. 519) Chief Justice Lewis, speaking of the alleged distinction between, and the power and duties of, ancillary and ordinary executors and administrators, says:

> They are occasionally described by different terms—the administrator of the *domicile* is sometimes called the *principal*, and sometimes the primary administrator—and the administrator of the *situs* is frequently called the auxiliary, and oftener the ancillary administrator. But it does not matter what terms are used to designate the distinction in fact as to the objects of the different administrators, so that we guard ourselves against the conclusion that there is a designation in law as to the rights of the parties entitled as distributees. It was truly said by the judge who delivered the opinion of the court in *Harvey* v *Richards* (1 Mason R., 381) that, there is no magic in the words, and

that each of the administrators may properly be considered as a principal under that reference to the limits of its exclusive authority, and each might under circumstances be justly deemed *auxiliary* administrator. Although the right of succession to personal assets of an intestate is to be regulated by the law of the country of which he was domiciled at the time of his death, it is fully settled that the *administration* of the estate must be *in the country in which possession of it is taken and held under lawful authority.*

Again, in the case of *Parker's Appeal* (61 Penn., 484), the Supreme Court, by Chief Justice Thompson, says:

The case of *Mothland* v. *Wierman* (3 Penn.) and *Dent's Appeal* (10 Harris, 514) abundantly show that assets are not to be transmitted to the administrator or executor of the domicile when there are domestic claimants or claimants within the jurisdiction of the ancillary administration. It would be a waste of time to discuss what we see so ably discussed in the opinion of Lewis, C. J., in the last-mentioned case.

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